TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 410

ADAM THOMAS, PETITIONER,

vs.

HEMPT BROTHERS, A PARTNERSHIP

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

PETITION FOR CERTIORARI FILED OCTOBER 23, 1952
CERTIORARI GRANTED DECEMBER 8, 1952

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No.

ADAM THOMAS, PETITIONER,

vs.

HEMPT BROTHERS, A PARTNERSHIP

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCT. 16, 1952.

—4406

[fol. a]

IN THE SUPREME COURT OF PENNSYLVANIA, PHILADELPHIA DISTRICT, JANUARY TERM, 1952

No. 66

ADAM THOMAS, Appellant,

vs.

HEMPT BROTHERS, Appellee

RECORD

Appeal from the Judgment of the Court of Common Pleas of Cumberland County at No. 6, September Term, 1947

Mark E. Garber, Carlisle Pa., Henry C. Kessler, Jr., York, Pa., Attorneys for Appellant.
25 South Duke Street, York, Pennsylvania.

[fol. 1] IN THE COURT OF COMMON PLEAS OF CUMBERLAND COUNTY, SEPTEMBER TERM, 1947

No. 6

ADAM THOMAS, Plaintiff,

vs.

HEMPT BROTHERS, Defendant

I

RELEVANT DOCKET ENTRIES

May 13, 1947, Praecipe for summons in Assumpsit filed.
May 13, 1947, Complaint in Assumpsit filed.
June 25, 1947, Preliminary Objections filed.
July 7, 1947, Answer to Preliminary Objections filed.
[fol. 1a] March 31, 1948, Opinion and Order of Court filed sustaining Preliminary Objection (62 D. & C. 618, 1948).

April 6, 1948, Petition for Rule to Show Cause and Order of Court filed.

April 27, 1948, Answer filed.

Jan. 18, 1949, Opinion and Order of Court filed.

July 11, 1949, Amended Complaint in Assumpsit filed.

Aug. 1, 1949, Answer to Amended Complaint filed.

Sept. 15, 1949, Plaintiff's Reply to New Matter filed.

Oct. 1, 1949, Motion for Judgment on the Pleadings filed.

Nov. 1, 1949, Plaintiff's answer to Defendant's Motion for Judgment on the Pleadings filed.

Oct. 28, 1950, Opinion and Order of Court filed (74 D. & C. 213, 1950).

Nov. 18, 1950, Amended Complaint in Assumpsit filed.

Dec. 4, 1950, Preliminary Objection to Amended Complaint filed.

Aug. 8, 1951, Opinion and Order of Court filed.

> "And now, August 8, 1951 the Motion of the Defendant in the nature of a Demurrer is granted and Judgment is entered in favor of the Defendant, Hempt Brothers, and against the Plaintiff, Adam Thomas, un-
> [fol. 1b] less the Plaintiff shall within twenty (20) days file an Amended Complaint so as to state a Cause of Action in Conformity to the foregoing Opinion".

Aug. 29, 1951, Praecipe for entry of Judgment in above action in favor of Defendant and against Plaintiff in accordance with Opinion and Order of Court filed, and Judgment entered in favor of Defendant and against Plaintiff.

Aug. 29, 1951, Judgment is hereby entered in favor of Defendant and against Plaintiff.

Oct. 9, 1951, Certiorari from Supreme Court filed.

Nov. 20, 1951, Statement of Question Involved filed.

Dec. 15, 1951, Certificate of Judge as to Amount in Controversy filed.

[fol. 2] IN THE COURT OF COMMON PLEAS

COMPLAINT—Filed May 13, 1947

And Now, to wit, this 18th day of November, 1950, comes the Plaintiff above and by his attorneys, Luria & Still, Esqs., and Henry C. Kessler, Jr., Esq., of the York County

(Pennsylvania) Bar and Mark E. Garber, Esq. of the Cumberland County (Pennsylvania) Bar, brings this action in assumpsit of which the following is his amended complaint:

1

Plaintiff is an individual residing at 353 North 17th Street, Camp Hill, Cumberland County, Pennsylvania.

2

Defendant is a partnership engaged in the stone quarry business and having its principal place of business at R. D. No. 1, Camp Hill, Cumberland County, Pennsylvania.

3

Defendant engaged Plaintiff as an employee under an oral contract of employment, said employment commencing prior to May 13, 1941, the date from which claim is made, [fol. 3] and continuing to date. During this period, Plaintiff has been regularly and continuously employed in the business of the Defendant, by virtue of an oral contract of employment, performing duties in connection with the normal and usual business of said Defendant and under its direction.

4

At the time of the cause of action herein set forth, to wit, that period between May 11, 1941 and April 14, 1945, Defendant Company was engaged in Interstate Commerce within the meaning of the Fair Labor Standards Act of 1938, 52 Stat. 1060, being an Act of the Congress of the United States, as well as the several decisions of the Supreme Court of the United States interpreting said Act of Congress, in that it was engaged in the usual course of its regular business in manufacturing, processing and delivering material used in carrying on the flow of interstate transportation, communication, and commerce; and the Plaintiff during the period aforesaid was employed by Defendant in its operation of a quarry wherein he, the said, Plaintiff, labored for Defendant in producing, processing, weighing and mixing sand, stones and cement, and loading trucks containing concrete, and giving directions to

company truck drivers as to the place of delivery daily of truck loads of sand and cement (concrete) to various customers of the said company, being namely, the contractor engaged in laying and building the Pennsylvania Turnpike, a highway which handles the flow of commerce [fol. 4] between the states; to the Harrisburg Municipal Airport for the building and erection of landing fields to accommodate the flow of airplanes in Interstate Commerce; to the Pennsylvania Railroad for use in the repair and maintenance of its roadbeds for the operation of its interstate passenger and freight trains; to the United States Army Depot; the U. S. Navy Depot; and other similar projects which aided the flow of commerce, as will be proven by Plaintiff when he has his day in Court. *Specifically the Plaintiff each and every single day during the specified period was given orders received by the company for concrete.* Plaintiff secured the proper number of trucks to haul the requirements of each order, and was in charge of the mixing process whereby various types of concrete were processed; he gave instructions to each mixer operator as to when to begin operation of his mixer so as to produce the material called for by the various orders; and when this process was completed, filled and loaded the trucks and dispatched them to the particular customer, *said customers daily including*, during the period specified herein, the United States Army, United States Navy, the Turnpike operation, as aforesaid, railroads, airports and various other interstate channels. Proof of all that is herein pleaded will be furnished on trial when Plaintiff has his day in Court.

5

As a result of said Interstate Commerce engaged in by Defendant and by Defendant's employee, the within Plain- [fol. 5] tiff, the provisions of the aforesaid Act of Congress are applicable, and the decisions of the Supreme Court of the United States interpreting the Act of Congress, and the meaning of "Interstate Commerce" are applicable and constitute the "law of this case".

6

For and during the aforementioned period, Plaintiff was not paid for overtime hours of employment as required by the said Act of Congress, as evidenced by the Plaintiff's Exhibit "A" attached hereto and made a part hereof, said overtime payments not commencing until April 15, 1945.

7

From May 13, 1941 to October 13, 1941, Plaintiff was paid the sum of $.50 per hour irrespective of the number of hours worked by him, with no overtime payment being paid to Plaintiff for hours worked by Plaintiff over and above that permitted by law.

8

From November 1, 1941 to March 31, 1942, Plaintiff received $.55 per hour, irrespective of the number of hours worked by him, with no overtime payment being paid to Plaintiff for hours worked by Plaintiff over and above that permitted by law.

9

From April 1, 1942 to June 15, 1942, Plaintiff received $.60 per hour irrespective of the total number of hours worked, with no overtime payment being paid to Plaintiff [fol. 6] for hours worked by Plaintiff over and above that permitted by law.

10

From June 16, 1942 to September 30, 1942, Plaintiff was paid $.65 per hour irrespective of the total hours worked, with no overtime payment being paid to Plaintiff for hours worked by Plaintiff over and above that permitted by law.

11

From October 1, 1942 to January 31, 1943, Plaintiff received $.70 per hour, irrespective of the number of hours worked, with no overtime payment being paid to Plaintiff for hours worked by Plaintiff over and above that permitted by law.

12

From February 1, 1943 to April 15, 1945, Plaintiff received $.75 per hour, irrespective of the number of hours worked, with no overtime payment being paid to Plaintiff for hours worked by Plaintiff over and above that permitted by law.

13

Commencing on or about April 15, 1945, the Defendant did begin to pay Plaintiff for his overtime in accordance with the applicable Act of Congress, more specifically referred to hereinafter. Plaintiff is therefore justly entitled to payment for overtime worked by him from May 13, 1941 to April 15, 1945, for which no payment was made. At- [fol. 7] tached hereto, marked Exhibit "A" and made a part hereof is the schedule of hours worked by Plaintiff per week, his statement of the hours of overtime per week and the amount due and owing to him each week by reason of Defendant's failure to pay him for said overtime, and the total thus due and owing to Plaintiff in accordance with the aforementioned Act of Congress.

14

In thus paying to the Plaintiff only the regular rate of pay for the total number of hours worked, and failing to pay for overtime, Defendant directly violated Section 16 (b) of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. A., Secs. 206, 207 and 216, being an Act of the Congress of the United States.

15

The Act of Congress herein referred to as well as the decisions of the United States Supreme Court interpreting the same are matters of which the Court will take judicial notice in determining the applicability of such legislation to the parties hereto.

16

Wherefore the Court of Common Pleas of Cumberland County, Pennsylvania, by virtue of the facts herein set forth, has jurisdiction over the subject matter of Plaintiff's cause of action as well as of all parties in interest.

Wherefore, Plaintiff claims of the Defendant the sum of two thousand three hundred seven dollars and fifty-six [fols. 8-9] cents ($2,307.56) being unpaid minimum wages and unpaid overtime wages as well as an equal sum as liquidated damages, as provided by Section 16 (b) of the said Act of Congress, and the further sum of $3,000.00 as reasonable counsel fees, pursuant also to the provisions of Section 16 (b) of the said Act of Congress, making a total sum of seven thousand six hundred fifteen dollars and twelve cents ($7,615.12) now due and owing to the Plaintiff.

Demand having been made for payment and the same having been refused, Plaintiff brings his suit.

(S.) Henry C. Kessler, Jr., Luria & Still, by William A. Luria, Mark E. Garber, Attorneys for Plaintiff.

Duly sworn to by Adam Thomas. Jurat omitted in printing.

[fol. 10]

EXHIBIT "A" TO COMPLAINT

Week of	Hrs. Worked	Rate Per Hour	No. Hrs. Overtime	Amt. Owing
May 11 to May 17 (1941)	74½	$ .50	34½	$8.63
May 18 to May 24	73½	.50	33½	8.38
May 25 to May 31	68½	.50	28½	7.13
June 1 to June 7	71	.50	31	7.75
June 8 to June 14	80	.50	40	10.00
June 15 to June 21	74	.50	34	8.50
June 22 to June 28	70½	.50	30½	7.63
June 29 to July 5	57	.50	17	4.25
July 6 to July 12	76½	.50	36½	9.13
July 13 to July 19	75	.50	35	8.75
July 20 to July 26	75	.50	35	8.75
July 27 to Aug. 2	72	.50	32	8.00
Aug. 3 to Aug. 9	71	.50	31	7.75
Aug. 10 to Aug. 16	70½	.50	30½	7.63
Aug. 17 to Aug. 23	72½	.50	32½	8.13
Aug. 24 to Aug. 30	72½	.50	32½	8.13
Aug. 31 to Sept. 6	72½	.50	32½	8.13
Sept. 7 to Sept. 13	70½	.50	30½	7.63
[fol. 11]				
Sept. 14 to Sept. 20	73½	.50	33½	8.38
Sept. 21 to Sept. 27	71½	.50	31½	7.88
Sept. 28 to Oct. 4	70½	.50	30½	7.63
Oct. 5 to Oct. 11	54¼	.50	14¼	3.56
Oct. 12 to Oct. 18	60¾	.50	20¾	5.19
Oct. 19 to Oct. 25	78½	.50	38½	9.63
Oct. 26 to Nov. 1	74	.50	34	8.50

EXHIBIT "A" TO COMPLAINT—Continued

Week of	Hrs. Worked	Rate Per Hour	No. Hrs. Overtime	Amt. Owing
Nov. 2 to Nov. 8	69½	.55	29½	8.11
Nov. 9 to Nov. 15	74	.55	34	9.35
Nov. 16 to Nov. 22	76	.55	36	9.90
Nov. 23 to Nov. 29	73	.55	33	9.08
Nov. 30 to Dec. 6	83	.55	43	11.83
Dec. 7 to Dec. 13	78½	.55	38½	10.59
Dec. 14 to Dec. 20	79	.55	39	10.73
Dec. 21 to Dec. 27	61	.55	21	5.78
Dec. 28 to Jan. 3 (1942)	76¼	.55	36¼	9.97
Jan. 4 to Jan. 10	75	.55	35	9.63
Jan. 11 to Jan. 17	72½	.55	32½	8.94
Jan. 18 to Jan. 24	73	.55	33	9.08
Jan. 25 to Jan. 31	65½	.55	25½	7.01
Feb. 1 to Feb. 7	61	.55	21	5.78
[fol. 12]				
Feb. 8 to Feb. 14	62½	.55	22½	6.19
Feb. 15 to Feb. 21	76	.55	36	9.90
Feb. 22 to Feb. 28	78½	.55	38½	10.59
Mar. 1 to Mar. 7	80	.55	40	11.00
Mar. 8 to Mar. 14	78	.55	38	10.45
Mar. 15 to Mar. 21	74½	.55	34½	9.49
Mar. 22 to Mar. 28	74	.55	34	9.35
Mar. 29 to Apr. 4	73	.55	33	9.08
Apr. 5 to Apr. 11	66½	.55	26½	7.95
Apr. 12 to Apr. 18	74	.55	34	10.20
Apr. 19 to Apr. 25	75	.55	35	10.50
Apr. 26 to May 2	74	.55	34	10.20
May 3 to May 9	67	.55	27	8.10
May 10 to May 16	73	.55	33	9.90
May 17 to May 23	75½	.55	35½	10.65
May 24 to May 30 (1942)	72½	.55	32½	9.75
May 31 to June 6	71½	.55	31½	9.45
June 7 to June 13	73½	.55	33½	10.05
June 14 to June 20	81½	.65	41½	13.49
June 21 to June 27	71½	.65	31½	10.24
June 28 to July 4	75½	.65	35½	11.54
[fol. 13]				
July 5 to July 11	85	.65	45	14.63
July 12 to July 18	90½	.65	50½	16.41
July 19 to July 25	94½	.65	54½	17.71
July 26 to Aug. 1	83½	.65	43½	14.14
Aug. 2 to Aug. 8	78½	.65	38½	12.51
Aug. 9 to Aug. 15	71	.65	31	10.08
Aug. 16 to Aug. 22	64½	.65	24½	7.96
Aug. 23 to Aug. 29	55½	.65	15½	5.04
Aug. 30 to Sept. 5	81½	.65	41½	13.49
Sept. 6 to Sept. 12	76	.65	36	11.70
Sept. 13 to Sept. 19	87	.65	47	15.28
Sept. 20 to Sept. 26	77	.65	37	12.03
Sept. 27 to Oct. 3	79	.65	39	12.68
Oct. 4 to Oct. 10	67½	.70	27½	9.13
Oct. 11 to Oct. 17	72½	.70	32½	11.38
Oct. 18 to Oct. 24	72	.70	32	11.20
Oct. 25 to Oct. 31	62	.70	22	7.70
Nov. 1 to Nov. 7	74½	.70	34½	12.08

EXHIBIT "A" TO COMPLAINT—Continued

Week of	Hrs. Worked	Rate Per Hour	No. Hr. Overtime	Amt. Owing
Nov. 8 to Nov. 14	74	.70	34	11.90
Nov. 15 to Nov. 21	85½	.70	45½	15.93
Nov. 22 to Nov. 28	81½	.70	41½	14.53
[fol. 14]				
Nov. 29 to Dec. 5	79½	.70	39½	13.83
Dec. 6 to Dec. 12	78½	.70	38½	13.48
Dec. 13 to Dec. 19	74	.70	34	11.90
Dec. 20 to Dec. 26	61	.70	21	7.35
Dec. 27 to Jan. 2 (1943)	74½	.70	34½	12.08
Jan. 3 to Jan. 9	75	.70	35	12.25
Jan. 10 to Jan. 16	76½	.70	36½	12.78
Jan. 17 to Jan. 23	72	.70	32	11.20
Jan. 24 to Jan. 30	74	.70	34	11.90
Jan. 31 to Feb. 6	86	.75	46	17.25
Feb. 7 to Feb. 13	67	.75	27	10.13
Feb. 14 to Feb. 20	71½	.75	31½	11.81
Feb. 21 to Feb. 27	75½	.75	35½	13.31
Feb. 28 to Mar. 6	70½	.75	30½	11.44
Mar. 7 to Mar. 13	74½	.75	34½	12.94
Mar. 14 to Mar. 20	76	.75	36	13.50
Mar. 21 to Mar. 27	73½	.75	33½	12.56
Mar. 28 to Apr. 3	77	.75	37	13.88
Apr. 4 to Apr. 10	72½	.75	32½	12.19
Apr. 11 to Apr. 17	83	.75	43	16.13
Apr. 18 to Apr. 24	73	.75	33	12.38
[fol. 15]				
Apr. 25 to May 1	71½	.75	31½	11.81
May 2 to May 8	71½	.75	31½	11.81
May 9 to May 15	78	.75	38	14.25
May 16 to May 22	73½	.75	33½	12.56
May 23 to May 29	77½	.75	37½	14.06
May 30 to June 5	70	.75	30	11.25
June 6 to June 12	72	.25	32	12.00
June 13 to June 19	74	.75	34	12.75
June 20 to June 26 (1943)	74	.75	34	12.75
June 27 to July 3	72½	.75	32½	12.19
July 4 to July 10	74	.75	34	12.75
July 11 to July 17	62½	.75	22½	8.44
July 18 to July 24	78	.75	38	14.25
July 25 to July 31	79½	.75	39½	14.81
Aug. 1 to Aug. 7	72	.75	32	12.00
Aug. 8 to Aug. 14	61	.75	21	7.88
Aug. 15 to Aug. 21	69½	.75	29½	11.06
Aug. 22 to Aug. 28	69	.75	29	10.88
Aug. 29 to Sept. 4	83½	.75	43½	16.31
Sept. 5 to Sept. 11	63	.75	23	8.63
Sept. 12 to Sept. 18	70	.75	30	11.25
[fol. 16]				
Sept. 19 to Sept. 25	69½	.75	29½	11.06
Sept. 26 to Oct. 2	74½	.75	34½	12.94
Oct. 3 to Oct. 9	75	.75	35	13.13.
Oct. 10 to Oct. 16	67½	.75	27½	10.31
Oct. 17 to Oct. 23	65	.75	25	9.38
Oct. 24 to Oct. 30	62½	.75	22½	8.44

EXHIBIT "A" TO COMPLAINT—Continued

Week of	Hrs. Worked	Rate Per Hour	No. Hrs. Overtime	Amt. Owing
Oct. 31 to Nov. 6	64	.75	24	9.00
Nov. 7 to Nov. 13	76	.75	36	13.50
Nov. 14 to Nov. 20	67	.75	27	10.13
Nov. 21 to Nov. 27	72	.75	32	12.00
Nov. 28 to Dec. 4	75	.75	35	13.13
Dec. 5 to Dec. 11	67	.75	27	10.13
Dec. 12 to Dec. 18	76½	.75	36½	13.69
Dec. 19 to Dec. 25	64	.75	24	9.00
Dec. 26 to Jan. 1 (1944)	66½	.75	26½	9.94
Jan. 2 to Jan. 8	74½	.75	34½	12.94
Jan. 9 to Jan. 15	76½	.75	36½	13.69
Jan. 16 to Jan. 22	77	.75	37	13.88
Jan. 23 to Jan. 29	72	.75	32	12.00
Jan. 30 to Feb. 5	71	.75	31	11.63
Feb. 6 to Feb. 12	78½	.75	38½	14.44
[fol. 17]				
Feb. 13 to Feb. 19	65	.75	25	9.38
Feb. 20 to Feb. 26	82	.75	42	15.75
Feb. 27 to Mar. 4	77½	.75	37½	14.06
Mar. 5 to Mar. 11	69	.75	29	10.88
Mar. 12 to Mar. 18	68	.75	28	10.50
Mar. 19 to Mar. 25	87	.75	47	17.63
Mar. 26 to Apr. 1	75½	.75	35½	13.31
Apr. 2 to Apr. 8	77	.75	37	13.88
Apr. 9 to Apr. 15	80	.75	40	15.00
Apr. 16 to Apr. 22	73	.75	33	12.38
Apr. 23 to Apr. 29	73½	.75	33½	12.56
Apr. 30 to May 6	68	.75	28	10.50
May 7 to May 13	72	.75	32	12.00
May 14 to May 20	86½	.75	46½	17.44
May 21 to May 27	81	.75	41	15.38
May 28 to June 3	75	.75	35	13.13
June 4 to June 10	74	.75	34	12.75
June 11 to June 17	87½	.75	47½	17.81
June 18 to June 24	74½	.75	34½	12.08
June 25 to July 1	80	.75	40	15.00
July 2 to July 8 (1944)	69	.75	29	10.88
[fol. 18]				
July 9 to July 15	82	.75	42	15.75
July 16 to July 22	73½	.75	33½	12.56
July 23 to July 29	62½	.75	22½	8.44
July 30 to Aug. 5	79½	.75	39½	14.81
Aug. 6 to Aug. 12	73	.75	33	12.38
Aug. 13 to Aug. 19	72½	.75	32½	12.19
Aug. 20 to Aug. 26	74	.75	34	12.75
Aug. 27 to Sept. 2	79	.75	39	14.63
Sept. 3 to Sept. 9	71½	.75	31½	11.81
Sept. 10 to Sept. 16	69	.75	29	10.88
Sept. 17 to Sept. 23	70⅓	.75	30½	11.44
Sept. 24 to Sept. 30	69	.75	29	10.88
Oct. 1 to Oct. 7	71	.75	31	11.63
Oct. 8 to Oct. 14	70½	.75	30½	11.44
Oct. 15 to Oct. 21	70½	.75	30½	11.44
Oct. 22 to Oct. 28	69½	.75	29½	11.06
Oct. 29 to Nov. 4	59½	.75	19½	7.31

EXHIBIT "A" TO COMPLAINT—Continued

Week of	Hrs. Worked	Rate Per Hour	No. Hrs. Overtime	Amt Owing
Nov. 5 to Nov. 11	70	.75	30	11.25
Nov. 12 to Nov. 18	75	.75	35	13.13
Nov. 19 to Nov. 25	63	.75	23	8.63
Nov. 26 to Dec. 2	69½	.75	29½	11.06
[fol. 19]				
Dec. 3 to Dec. 9	78½	.75	38½	14.44
Dec. 10 to Dec. 16	59½	.75	19½	7.31
Dec. 17 to Dec. 23	80½	.75	40½	15.19
Dec. 24 to Dec. 30	75	.75	35	13.13
Dec. 31 to Jan. 6 (1945)	72½	.75	32½	12.19
Jan. 7 to Jan. 13	70	.75	30	11.25
Jan. 14 to Jan. 20	78	.75	38	14.25
Jan. 21 to Jan. 27	69½	.75	29½	11.06
Jan. 28 to Feb. 3	71	.75	31	11.63
Feb. 4 to Feb. 10	76	.75	36	13.50
Feb. 11 to Feb. 17	79	.75	39	14.63
Feb. 18 to Feb. 24	71	.75	31	11.63
Feb. 25 to Mar. 3	77½	.75	37½	14.06
Mar. 4 to Mar. 10	76½	.75	36½	13.69
Mar. 11 to Mar. 17	74	.75	34	12.75
Mar. 18 to Mar. 24	68	.75	28	10.50
Mar. 25 to Mar. 31	63½	.75	23½	8.81
Apr. 1 to Apr. 7	67½	.75	27½	10.31
Apr. 8 to Apr. 14	68½	.75	28½	10.69
Total				$2307.56

[fol. 20] IN THE COURT OF COMMON PLEAS

PRELIMINARY OBJECTIONS TO AMENDED COMPLAINT IN ASSUMPSIT—Filed June 25, 1947

To the Honorable, the President Judge of the said Court:

Defendant, Hempt Brothers, by its attorneys, Myers and Myers and McNees, Wallace & Nurick, comes and files these Preliminary Objections to the amended Complaint filed on November 21, 1950, in the above-entitled matter, moves the court for judgment and hereby assigns the following reasons therefor:

1. The facts alleged in the amended complaint, in addition to affirmatively disclosing that plaintiff was an off-the-road employee at a quarry beyond the scope of the Fair Labor Standards Act of 1938 as interpreted in numerous decisions, fails to set forth facts vesting this court with

jurisdiction or rendering applicable at any time the Fair Labor Standards Act of 1938.

2. The amended complaint, while itemizing plaintiff's compensation by work weeks, fails to set forth specifically in what weeks, or months or years, the trucks for which plaintiff claims he produced sand, stone and cement, delivered concrete to any contractor building the Pennsylvania Turnpike, to the Harrisburg Municipal Airport, to the Pennsylvania Railroad, or to the United States Army or Navy. Plaintiff also fails to set forth as to any specific week where one of these consignees was involved the [fol. 21] identity of the customer or the nature of the use, whether new construction or otherwise unrelated to interstate commerce, to which the concrete was put. With so general a pleading the court could not determine for what weeks, if any, it has jurisdiction, nor determine in what amount any judgment for plaintiff might appropriately be entered.

3. For the purpose of informing defendant of the bases of plaintiff's claim, defining the issues, and limiting the testimony to be produced, plaintiff should set forth, but the amended complaint fails to set forth, the uses to which the concrete, for which plaintiff claims he helped produce sand, stones and cement at defendant's quarry, was put. So far as plaintiff has referred in Paragraph 4 of the amended complaint to "building" it affirmatively appears that the concrete for customers of defendant, such as the unnamed Turnpike contractor and the Harrisburg Municipal Airport, was used in new construction to which the Act has not application.

Wherefore, defendant prays that plaintiff be ordered to make his amended complaint more specific and defendant further demands that judgment be entered in favor of the defendant and against the plaintiff in the above-captioned matter.

Myers and Myers. By Robert L. Myers, Jr. McNees, Wallace & Nurick. By James H. Booser.

[fol. 22] IN THE COURT OF COMMON PLEAS

OPINION AND ORDER OF COURT—March 31, 1948

The Plaintiff, Thomas, filed this action in assumpsit against the defendant to recover compensation for overtime wages, liquidated damages and counsel fees pursuant to Sections 7 and 16 (b) of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 1063, 1069, 29 U.S.C.A., Sections 207 and 216. The Plaintiff seeks to recover compensation for the period beginning May 11, 1941 and ending April 14, 1945, after which period the defendant began to pay the plaintiff one and one-half times the regular hourly rate for any hours in excess of forty in any work week.

The matter now before the court is a consideration of preliminary objections to the plaintiff's amended complaint. For the purpose of brevity we shall refer to the amended complaint simply as the complaint. Two prior opinions have been filed in this case concerning other phases of this litigation which are reported in 62 D. & C. 618 and 74 D. & C. 213.

The first objection to the amended complaint is in the nature of a demurrer.

In the complaint the plaintiff avers that the defendant is a partnership engaged in the stone quarry business, [fol. 23] having its principal place of business at Camp Hill, R. D. No. 1, Cumberland County, Pennsylvania. In paragraph 4 of the complaint the plaintiff avers inter alia as follows: "* * * Plaintiff during the period aforesaid was employed by Defendant in its operation of a quarry wherein he, the said Plaintiff, labored for Defendant in producing, processing, weighing and mixing sand, stones and cement, and loading trucks containing concrete, and giving directions to company truck drivers as to the place of delivery daily of truck loads of sand and cement (concrete) to various customers of the said company, being namely, the contractor engaged in laying and building the Pennsylvania Turnpike, a highway which handles the flow of commerce between the states; to the Harrisburg Municipal Airport, for the building and erection of landing fields to accommodate the flow of airplanes in Interstate Commerce; to the Pennsylvania Railroad for use in the repair and main-

tenance of its roadbeds for the operation of its interstate passenger and freight trains; to the United States Army Depot; the U. S. Navy Depot; and other similar projects which aided the flow of commerce, * * * Specifically the Plaintiff each and every single day during the specified period was given orders received by the company for concrete. Plaintiff secured the proper number of trucks to haul the requirements of each order, and was in charge of the mixing process whereby various types of concrete were processed; he gave instructions to each mixer oper- [fol. 24] ator as to when to begin operation of his mixer so as to produce the material called for by the various orders; and when this process was completed, filled and loaded the trucks and dispatched them to the particular customer, said customers daily including, during the period specified herein, the United States Army, United States Navy, the Turnpike operation, as aforesaid, railroads, airports and various other interstate channels. * * *"

The averments of the complaint as to the nature of the plaintiff's exact duties are set forth in full since as we said in a previous opinion in this case, 62 D. & C. 618 at 624. "The Federal Courts have held repeatedly that the coverage of the Fair Labor Standards Act depends upon the character of the activities of a particular employee rather than upon the nature of the business of the employer. * * * "

In support of his demurrer the defendant contends that the plaintiff's complaint affirmatively discloses that the plaintiff was an off-the-road employee, at a quarry, and therefore was beyond the scope of the Fair Labor Standards Act of 1938, and that the defendant is therefore entitled to a judgment on the pleadings. A consideration of the decisions interpreting the Act leads to the conclusion that this position is well taken.

In McLeod v. Threlkeld, 319 U. S. 491; 63 S. Ct. 1248, the Supreme Court of the United States held that a cook and caretaker for maintenance-of-way men on a railroad was not engaged in commerce under the Act. Coverage of [fol. 25] the Act was limited to employees actually engaged in working upon the interstate transportation facilities. It had previously been decided that on-the-road employees were covered by the Act in Overstreet v. North Shore Cor-

poration, 318 U. S. 125; 63 S. Ct. 494, in which it was held that employees operating and maintaining privately-owned toll roads and bridges over navigable waterways were "engaged in commerce".

The decision in the instant case is directly controlled by the case of Shroeder Company, Inc. v. Clifton, 153 F. 2d 385. In that case one group of employees was engaged at a quarry in mining, producing, and processing stone used for a gravel cushion and riprap in the construction of relocated portions of a railroad and a highway. The court held that the Fair Labor Standards Act was inapplicable to these employees. The court said, beginning at page 389: "The work of the employees in question, either separate and distinct or as an integral part of the integrated effort, *did not have for its purpose the production or manufacture of any goods or commodity for movement in interstate commerce.* Their work was not directed to the production or manufacture of anything for commerce, within the meaning of the Act. They were engaged in local business * * *

"* * * If Congress had intended to extend the coverage of the Act *to employees engaged in the production of goods for a railroad or other instrumentality of interstate commerce, even though the goods were not to move in com-* [fol. 26] *merce, it certainly would have employed apt words to express the intention.* We fail to find any thing in the language of the Act or its legislative history which lends support to the view that Congress purposed to bring workmen of that class within the coverage.

"* * * Off-the-railroad and off-the-highway employees, working at a remote point in the mining, production and processing of gravel cushion and riprap for use in the construction of relocated portions of the railroad and the highway are not engaged in the movement of commerce or so closely related to it as to be for all practical purposes a part of it, within the meaning of the Act." (Emphasis supplied).

The Shroeder case was followed in the case of McComb v. Trimmer et al., 85 F. Supp. 565 (1949) in which it was held that employees engaged in the production of crushed stone, shale, gravel and sand at a place of business in New Jersey were not covered by the act even though the materials were used in the maintenance, repair and recon-

struction of highways carrying interstate trade and commerce.

The complaint in this case does not state that any of the materials handled by Thomas were delivered outside of this state; on the other hand we take judicial notice of the fact that all of the customers referred to in the complaint are situated within this state. If the facts are otherwise, such may be shown in an amended complaint, permission for the filing of which will be granted. We are disposing of [fol. 27] the matter in this manner, rather than directing an amendment to the complaint in limine so that further delay in the conclusion of this extended litigation may be avoided.

The averments of the complaint clearly indicate that the plaintiff is an off-the-road employee and that none of the goods handled by him are produced for interstate commerce. He is, therefore, not within the coverage of the Fair Labor Standards Act.

The defendant's preliminary objection in the nature of a demurrer must be sustained. It is, therefore, unnecessary to discuss the matters covered in the motion for a more specific statement.

Although plaintiff's counsel indicated that the plaintiff's case must rise or fall on the averments of paragraph 4 of the amended complaint, the usual opportunity will be granted to further amend the complaint so as to state a good cause of action.

And now, August 8, 1951, the motion of the defendant in the nature of a demurrer is granted, and judgment is entered in favor of the defendant, Hempt Brothers, and against the plaintiff, Adam Thomas, unless the plaintiff shall within twenty (20) days file an amended complaint so as to state a cause of action in conformity to the foregoing opinion.

By the Court, (S.) Dale F. Shughart, P. J.

[fol. 27a] IN THE SUPREME COURT OF PENNSYLVANIA, JANUARY TERM, 1952

DOCKET ENTRIES

66

Mark E. Garber, Henry C. Kessler, Jr., Robert L. Myers, Jr., Myers & Myers, 10-11-51.

ADAM THOMAS, Plaintiff,

vs.

HEMPT BROTHERS, Defendant

Appeal of plaintiff, No. 6, September Term, 1947, from the judgment.

Appeal from Court of Common Pleas of the County of Cumberland, Filed October 3, 1951. Eo. die certiorari exit. Retble. second Monday of April, 1952.

March 27, 1952. Record returned and filed. April 17, 1952. Argued. June 24, 1952. Judgment affirmed. Opinion by Jones, J., Dissenting opinion by Musmanno, J.

July 7, 1952. Remittitur exit and with record sent to: Prothonotary, Cumberland County.

July 9, 1952. Acknowledgment of record, remittitur, etc., received and filed.

July 11, 1952. Petition for leave to file petition for reargument filed. Henry C. Kessler, Jr.

August 15, 1952. Petition denied. Per Curiam.

September 19, 1952. Petition for transcript of record filed. Henry C. Kessler, Jr.

[fol. 28] IN THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

ADAM THOMAS, Appellant,

v.

HEMPT BROTHERS

OPINION OF THE COURT—June 24, 1952

JONES, J.:

The plaintiff, an employee of the defendant partnership, filed his complaint in the Court of Common Pleas of Cumberland County seeking to recover from his employer overtime wages for a specified period, liquidated damages and counsel fees under the provisions of Secs. 6, 7 and 16 (b) of the Fair Labor Standards Act of 1938 as amended.[1]

After preliminary objections to the original complaint and also to the first amended complaint had been sustained (see 62 D. & C. 618, 626, and 74 D. & C. 213, 218), a second amended complaint was filed. Preliminary objections to that complaint were also sustained and the judgment for the defendant from which the plaintiff has appealed was automatically entered after the plaintiff had failed to file a further amended complaint within twenty days as authorized by the court's order conditionally entering the judgment for the defendant.

The complaint averred that the defendant, Hempt Brothers, is a partnership engaged in the stone quarry business with its principal place of business in Camp Hill, Pa.; and that, during the period of time covered by the complaint, the plaintiff worked for the defendant "in producing, processing, weighing and mixing sand, stones and cement and loading trucks containing concrete and [in] giving directions to [defendant's] truck drivers as to the place of delivery daily of truckloads of sand and cement [fol. 29] (concrete) to various customers" of the defendant. The customers were the Pennsylvania Turnpike, the Harris-

[1] Act of Congress of June 25, 1938, 52 Stat. 1060, as amended October 29, 1941, 55 Stat. 756, 29 U. S. C. A., §§ 206, 207, 216 (b).

burg Municipal Airport; the Pennsylvania Railroad Company, the U. S. Army Depot and the U. S. Navy Depot, all of which are located within the State of Pennsylvania. The complaint further averred that, during the specified period, orders received by the company for concrete were communicated each day to the plaintiff who secured the proper number of trucks to haul the requirements of each order and was in charge of the mixing process whereby various types of concrete were processed; that he gave instructions to each mixer operator as to when to begin operation of his mixer so as to produce the material called for by the various orders; and that, when this process was completed, he filled and loaded the trucks and dispatched them to the indicated customers. The complaint does not contain any averment that the materials processed, handled or dispatched by the plaintiff either originated or were delivered outside of Pennsylvania; however, it is readily conceded that the defendant's customers maintained facilities for handling persons or property moving in interstate commerce.

The question involved is whether the complaint states a cause of action within the provisions of the Fair Labor Standards Act. The answer depends upon whether the plaintiff, in the performance of the duties of his employment, was engaged "in commerce or in the production of goods for commerce" as contemplated by Sec. 7 (a) of the Act (29 U. S. C. A. § 207 (a) Pkt. Part). "Commerce" is defined by Sec. 3 (b) of the Act (29 U. S. C. A. § 203 (b) Pkt. Part) as meaning "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

In considering whether an employee is within the coverage of the Act, it is essential to keep in mind that it is the nature of the *employee's* activities in the course of his work and *not* the character of his employer's business that de- [fol. 30] termines whether the employee is engaged in commerce or in the production of goods for commerce. In *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 571, the Supreme Court said that "The fact that all of [the employer's] business is not shown to have an interstate character is not important. *The applicability of the Act is dependent on the character of the employees' work*" (Emphasis supplied). Or, as stated in *McLeod v. Threlkeld*, 319

U. S. 491, 497,—"It is not important whether the employer * * * is engaged in interstate commerce. It is the work of the employee which is decisive."

There is, however, no hard and fast rule for determining when an employee is engaged in commerce or in the production of goods for commerce. In *A. B. Kirschbaum Co. v. Walling, Administrator, etc.*, 316 U. S. 517, 520, where the extent of the coverage afforded by the Act was under consideration, it was recognized that "Perhaps in no domain of public law are general propositions less helpful and indeed more mischievous than where boundaries must be drawn, under a federal enactment, between what it has taken over for administration by the central Government and what it has left to the States." Our task is to deduce from the federal decisions in specific cases, arising under the Act, criteria for determining whether on the admitted facts of this case the plaintiff was engaged either in commerce or in the production of goods for commerce.

In *Overstreet v. North Shore Corporation*, 318 U. S. 125, men engaged in maintaining or operating a toll road and drawbridge over a navigable waterway, which together constituted a medium for the interstate movement of goods and persons, were held to be "engaged in commerce." It was there said (p. 130) that "Those persons who are engaged in maintaining and repairing such [interstate] facilities should be considered as 'engaged in commerce' * * * because without their services these instrumentalities would not be open to the passage of goods and persons across state lines." A little later in *McLeod v. Threlkeld*, supra, [fol. 31] it was stated for the Supreme Court (p. 497) that "The test under this [Fair Labor Standards] act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it." That this was an intended limitation of the broader language used in the *Overstreet* case, supra, is inferrable from the fact of the dissent in the *McLeod* case by Mr. Justice Murphy who had written the majority opinion in the *Overstreet* case and the further fact that the two dissenters in the earlier (*Overstreet*) case were of the majority in the *McLeod* case. In that case the court

refused to extend "the conception of 'in commerce' * * * beyond the employees engaged in actual work upon the transportation facilities" and, accordingly, held that a cook who furnished meals to men engaged in maintaining an interstate railroad was not "engaged in commerce".

In keeping with the foregoing decisions of the Supreme Court, the Court of Appeals for the Tenth Circuit, in a well considered opinion, held that workers in a quarry who excavated and processed stone for local use on a highway and a railroad, both interstate instrumentalities, were outside the Act for the reason that "In order to be engaged in commerce within the scope of the Act, the employee must be actually engaged in the movement of commerce or the service which he performs must be so closely related to it as to be for all practical purposes a part of it". *E. C. Schroeder Co., Inc.* v. *Clifton*, 153 F. 2d 385, 390 (C. A. 10), cert. den. 328 U. S. 858. For other federal cases holding that quarry workers employed in producing and processing stone and shale for local use on interstate highways are not within the Fair Labor Standards Act, see *McComb* v. *Trimmer*, 85 F. Supp. 565 (D. C. N. J.) and *Walling* v. *Craig*, 53 F. Supp. 497 (D. C. Minn.).

It is further contended, however, that, even though manual workers in "off-the-road" activities, such as the cook in the *McLeod* case or the quarrymen in the *Schroeder*, [fol. 32] *Trimmer* and *Craig* cases, supra, are not engaged in commerce, the present plaintiff's supervisory duties in connection with the loading and dispatching of the trucks which delivered the concrete to the defendant's customers were of a sufficiently quasi-managerial nature as to engage him in commerce. We fail to see how he was any less an "off-the-road" worker. His supervisory duties did not actually connect him with the movement of commerce nor was the service which he thus performed so closely related to commerce as to be, for all practical purposes, a part of it (*Schroeder* v. *Clifton*, supra). It follows, therefore, that, under the facts pleaded, the plaintiff was not engaged in commerce within the intendment of the Fair Labor Standards Act.

That brings us to the remaining question whether the plaintiff was engaged in the production of goods for commerce. A material distinction between being engaged in

commerce and being engaged in the production of goods for commerce is recognized by the cases: see *Overstreet* v. *North Shore Corporation*, supra; *McLeod* v. *Threlkeld*, supra; *E. C. Schroeder Co., Inc.* v. *Clifton*, supra; *Walling* v. *Sondock*, 132 F. 2d 77, 78 (C. A. 5); and *Fleming* v. *Stillman*, 48 F. Supp. 609, 619 (D. C. M. D. Tenn.). The *Schroeder* case well exemplifies the differentiation. There, as we have already seen, the employees who quarried and prepared the rock for local use on a highway and on a railroad, both interstate instrumentalities, were not engaged "in commerce." Yet another group of similar employees who quarried some of the same kind of rock for use directly in the construction of a dike to prevent a nearby oil field from being inundated and ruined by the encroachment of water from a dam, then under construction, were held to be within the Act. The reason for the latter conclusion was that such employees' work contributed immediately to the continued flow of oil which, of itself, was an article of commerce. The court thus reasoned: "Quarrying the rock, processing it, and hauling some of it to the dyke constituted part of the integrated effort having for [fol. 33] its purpose the protection of the oil field from being flooded in order that production of oil and its movement in interstate commerce might continue. While bearing that close and immediate tie to the integrated effort designed to effectuate the continued production of oil and its movement in interstate commerce, the employees were *engaged in the production of goods for commerce* * * *" (Emphasis supplied).

In the present instance, the stone was quarried locally for local use. True enough, as a part of a concrete aggregate, the stone became imbedded in interstate transportational facilities, but it never moved in interstate commerce nor became a part of commerce. The fact that the workmen who applied the concrete to the maintenance of the interstate instrumentalities may have consequently been "in commerce" (see *Overstreet* v. *North Shore Corporation*, supra) did not constitute the "off-the-road" employees, who prepared and delivered the concrete, producers of goods for commerce. So concluding, we could leave the matter here were it not for a recent decision of the Court of Appeals for the Third Circuit (*Tobin* v. *Alstate Con-*

struction Company, — F.2d —, handed down April 9, 1952) which needs be considered.

In the *Alstate* case, supra, the defendant employer made, distributed and applied amesite, a bituminous product used in resurfacing roads. Some of the component materials came from outside the State, but all of the product was compounded, delivered and used within the State, about 85% of it being used in the maintenance and repair of interstate highways. The defendant employer conceded that those of its employees who applied the amesite to the highways were covered by the Act, being "engaged in commerce" on analogy to the service performed in *Overstreet v. North Shore Corporation*, supra. The defendant contended, however, that those of its employees who hauled the materials to the amesite plants, those who worked in the compounding plants and those who delivered the amesite from the plants to the defendant's various customers were not "engaged in [fol. 34] commerce" and, therefore, were not covered by the Act under the rulings in the *McLeod*, *Schroeder*, *Craig* and *Trimmer* cases, supra. The action in the *Alstate* case was by the Secretary of Labor for relief against alleged violations of the Act by the defendant with respect to the employees just indicated. The District Court, apparently being of the opinion that they also were engaged "in commerce," issued an injunction restraining the defendant from cognate violations of the Act.

The Court of Appeals, in affirming the decree in the *Alstate* case, supra, went considerably further than the District Court had gone and held that "* * * Alstate's off-the-road employees, in producing material which is used to repair and maintain the surfaces of instrumentalities of commerce, are engaged 'in the production of goods for commerce.'" This decision not only conflicted directly with the ruling in the *Schroeder* case, with respect to "off-the-road" employees who locally produce and prepare materials for local use in the repair and maintenance of interstate instrumentalities, but it, at once, introduced an entirely new theory for bringing such employees within the coverage of the Act, namely, that they are engaged "in the production of goods for commerce." The way in which the learned court reached this conclusion was by reasoning that, inasmuch as *goods in commerce* would be hauled over the high-

ways which were repaired and maintained with materials furnished by the "off-the-road" employees, the latter were in an "occupation directly essential to the production" of *such* goods within the intent of Sec. 3 (j) of the Act. The vast number of purely local employments that would be made subject to the Act on the basis of the theory of the *Alstate* case is not difficult to imagine. It is readily conceivable that many, if not most, local activities are "necessary", at least in some remote degree, to the production of goods for commerce. Particularly pertinent becomes the caution voiced by the Court of Appeals for the Sixth Circuit, when construing the coverage of the Fair Labor Standards Act in *Chapman v. Home Ice Co. of Memphis*, 136 F. 2d 353, [fol. 35] 355 (one of the so-called "ice" cases),—"We are not unmindful of the fact that a rationalization based upon the doctrine of necessity may, under 'The House That Jack Built'" tee-nie, lead to absurdity and end by ignoring all practical distinction between 'what is parochial and what is national.'"

When called upon to apply a federal statute, we necessarily give it the meaning which the highest federal judicial authority to pronounce upon it to date has ascribed to it; and, where courts of equal dignity have differed in their interpretations, we naturally accept the decision which to us reaches the more logical conclusion. Accordingly, we choose to follow the ruling of the *Schroeder* case with respect to the "off-the-road" employees of the independent contractor for reasons which we shall now express.

The difference which the opinion in the *Alstate* case attributes to the *Schroeder* case, wherein it states that the interstate instrumentalities in the latter case were "new construction", is apparent rather than real. Actually, the work in the *Schroeder* case was not "new construction" within the contemplation of that term as employed in the Act. It was but a relocation of existing arteries of interstate traffic (viz., a highway and a railroad) made necessary by the Federal Government's construction of the Denison Dam and Rese-voir. Thus, it was noted in the *Schroeder* case (p. 387) that "The relocated track has been connected with the existing track of the railroad company and has become a permanent part of it. The relocated portion of the highway when completed was or is to become a part of

the existing highway but it had not been completed at the time of the trial of this case." Certainly, the Court of Appeals, which decided the *Schroeder* case, did not regard "new construction" as being present nor was it assigned as a reason for excluding the particular employees from the coverage of the Act as it should have been, and no doubt would have been, had the work been "new" construction within the meaning of the Act: cf. *Kelly v. Ford, Bacon & [fol. 36] Davis, Inc.*, 162 F. 2d 555 (C.A. 3).

The *Alstate* opinion sought to distinguish the *Craig* case, supra, on the ground that it was decided prior to the Administrator's ruling of March 1945 that employees preparing local materials for local use by instrumentalities of commerce were producing goods for commerce. Incidentally, the *Schroeder* case was decided subsequent to the Administrator's ruling and in evident and authoritative disregard of it. In any event, the ruling was based upon the so-called "ice cases" which are plainly distinguishable. Yet, one of them (*Atlantic Co. v. Walling*, 131 F. 2d 518, C.A. 5) is cited in the *Alstate* opinion as authority for its ruling and two others (*Chapman v. Home Ice Co. of Memphis*, supra, and *Hamlet Ice Co. v. Fleming*, 127 F. 2d 165, C.A. 4) are cited in a footnote. The "ice cases" were discriminatingly distinguished in the *Schroeder* case where Judge Bratton, speaking for the court, said (p. 389),—"Our attention is directed to the so-called ice cases [citing them]. In all of them, the ice company produced ice and sold it to a railroad company, an express company, or other like agency, for icing refrigerator cars, icing dining cars, icing shipments of less than car lots, or other similar purpose; and the major contention of the ice company was that since it sold the ice at the point of production to the transportation company, the production was local and therefore its employees were not within the coverage of the Act. That contention was rejected. But in wide difference from the facts here, it affirmatively appears in three of those cases and is fairly inferable in the fourth, that some of the ice actually moved across state lines before being consumed by use or otherwise, and that it was produced and sold with knowledge and intent that it would move in that manner. It is true that in *Atlantic Co. v. Walling*, supra, the court said in effect that the production of goods for commerce, within the meaning

of the Act, includes the production of goods for use by an instrumentality of interstate commerce as an essential part [fol. 37] of such commerce, even though the particular goods produced do not move in commerce. But the Act does not speak of the production of goods for commerce as distinguished from commerce itself." The foregoing distinction of the ice cases was quoted with approval and followed by the District Court for the District of New Jersey in the *Trimmer* case, supra.

It may be further observed that the portion of the ice so used for refrigeration which was consumed before it crossed the State line veritably entered into and became a part of the goods in commerce whose freshness and edibility it helped conserve. It was no doubt because of the expected physical relation or reaction between goods in commerce and the ice which refrigerates them that Sec. 1 (3) of the Interstate Commerce Act of 1887, as amended, 49 U.S.C.A. § 1(3), expressly declared, inter alia, that "transportation" (interstate) includes " * * * all services in connection with the * * * refrigeration or icing * * * of property transported." The very first of the "ice cases" (sub nom. *Fleming v. Atlantic Co.*, 40 F. Supp. 654, 661, D.C.M.D. Ga.) specifically relied on this statutory declaration of the interstate character of the icing service of goods in commerce. The rationale of the "ice cases" is obviously not applicable to "off-the-road" employees who furnish materials locally for local use.

The case of *Roland Electrical Co. v. Walling*, 326 U. S. 657, which the *Alstate* opinion cites, is not presently in point. The employees who were there held to be under the Act made parts of electric motors which were used, inter alia, to manufacture goods for commerce. Consequently, under the definition of "produced" in Sec. 3 (j) of the Act, such employees were held to be in an occupation necessary to the production of goods for commerce. The relation was direct and immediate. In *Lewis v. Florida Power & Light Co.*, 154 F. 2d 751 (C.A. 5), upon which the *Alstate* opinion also relies, the employees of an electrical company whose power was utilized in commerce and for the production of goods in commerce were likewise held, under the broad [fol. 38] definition of "produced" in Sec. 3 (j), to be in an

occupation necessary to the production of goods for commerce. There is no similarity between the facts of these cases and the "off-the-road" employees of the instant case.

Finally, we accept the inference drawn in the *Schroeder* case that "If Congress had intended to extend the coverage of the Act to employees engaged in the production of goods for a railroad or other instrumentality of interstate commerce, even though the goods were not to move in commerce, it certainly would have employed apt words to express the intention." This view later received congressional confirmation: see Conference Report on Amendments to the Fair Labor Standards Act, 81st Cong., 1st Sess., 1949, U. S. Code Congressional Service, Vol. 2, pp. 2251, 2252-2254, where the *Schroeder* case was specifically treated with. The portion of the decision in that case which had extended the coverage of the Act to the quarry workers who prepared the rock for building the dike to protect the oil field from flooding was offset and avoided for the future by recommended amendment which became the Act of October 26, 1949, c. 736, Sec. 3 (j), 63 Stat. 911, 29 U.S.C.A. § 203 Pkt. Part.

Judgment affirmed.

Dissenting opinion by Musmanno, J.

[File endorsement omitted.]

[fol. 39] IN THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT, JANUARY TERM, 1952

No. 66

ADAM THOMAS, Appellant,

v.

HEMPT BROTHERS

Appeal from Judgment of the Court of Common Pleas of Cumberland County at No. 6, September Term, 1947

DISSENTING OPINION

MUSMANNO, J.:

The fact that the defendant, since 1945, has paid the plaintiff overtime hours of employment in accordance with the provisions of the Fair Labor Standards Act is certainly evidence that the defendant believes that plaintiff's work is of an interstate character. And if it has been interstate since 1945, why should it not have been interstate from 1941 to 1945, when admittedly it was exactly the same type of work?

The averments in the plaintiff's statement of claim, if believed, clearly establish that he was engaged in handling material in interstate commerce. If the defendants challenged the accuracy and the veracity of his assertion, the Court could have taken testimony which would have proved or disproved his assertions. It is my opinion that entering judgment in favor of the defendant was error.

[File endorsement omitted.]

[fol. 40] IN THE SUPREME COURT OF PENNSYLVANIA

[Title omitted]

To the Prothonotary of the said Court:

PRAECIPE FOR TRANSCRIPT OF RECORD

Kindly prepare and certify to the Supreme Court of the United States the following papers:

a. Docket Entries,
b. The printed record as it appeared at the time the above case was argued in the Pennsylvania Supreme Court,
c. The majority opinion of the Supreme Court,
d. The dissenting opinion filed in the said case.

(S.) Henry C. Kessler, Jr., Attorney for Plaintiff.

[fol. 41] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 42] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 410

ADAM THOMAS, Petitioner,

vs.

HEMPT BROTHERS, a Partnership

ORDER ALLOWING CERTIORARI—Filed December 8, 1952

The petition herein for a writ of certiorari to the Supreme Court of the Commonwealth of Pennsylvania is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.